Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics

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Over the last several years, the environmental regulatory system has undergone radical changes. Various private normative schemes, ranging from corporate codes to environmental management systems, environmental reporting standards, project-finance codes and green indexes, have assumed an increasingly important role in the regulatory arena. The emergence of private environmental governance as an important transnational phenomenon raises two interrelated puzzles: efficacy and legitimacy. Underlying the efficacy puzzle is a deep-seated suspicion toward "soft" legal instruments, which to some observers represent nothing but a coordinated form of "greenwash." The legitimacy question reflects a contrary concern — that these private regulatory structures represent new forms of global authority that are in need of distinctive legitimization. The Article begins with an outline of this new global terrain, exploring its historical evolution. It argues that the multiple links and cross-sensitivities between the different global private regimes have created a novel ensemble regulatory structure with positive enforcement and normative externalities. The Article then moves to examine the question of efficacy more generally, developing a nuanced understanding of the social dynamic of "soft-law" regulation, which rejects the binary logic underlying the "soft law"-"greenwash" narratives. Regarding the political dimension, the Article argues that this new ensemble network has brought about a new transnational political sphere which is associated with an extensive, cross-institutional quest

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for legitimacy. The Article then turns its focus to the field of sustainability indexes, focusing on the two leading global indexes: FTSE4Good Index Series and Dow Jones Sustainability Indexes (DJSI). These indexes are taken as a prototypical case of transnational private ordering. Drawing on a close analysis of the indexes' guiding documents and on interviews with senior executives from both organizations, the Article considers the unique features of these indexes as forms of governance and the paths through which they claim to affect society. It then moves to explore the mechanisms of legitimacy employed by FTSE4Good and DJSI, highlighting their distinctive visions of legitimization. A close examination of sustainability indexes generates insights, I will argue, regarding the field of private global environmental governance as a whole. In particular, it highlights both the new political opportunities created by the evolving network of transnational governance and the limits this new structure sets for radical critique.

INTRODUCTION

Over the last several years the field of transnational environmental governance has changed its face. Once dominated by treaty-based mechanisms, this field is now populated by numerous private schemes, which include voluntary corporate codes,[1] environmental management systems,[2] "green label" schemes,[3] environmental reporting standards,[4] green financial

1 *E.g.*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES OF MULTINATIONAL ENTERPRISES (2001), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf; INTERNATIONAL CHAMBER OF COMMERCE, THE BUSINESS CHARTER FOR SUSTAINABLE DEVELOPMENT (1991), *available at* http://www.iccwbo.org/id1309/index.html.

2 *E.g.*, INTERNATIONAL STANDARDS ORGANIZATION (ISO), ISO 14001: ENVIRONMENTAL MANAGEMENT SYSTEMS (1996); Regulation (EC) No. 1221/2009 of the European Parliament and of the Council of 25 November 2009, the Voluntary Participation by Organisations in a Community Eco-Management and Audit Scheme (EMAS); *Responsible Care*, INTERNATIONAL COUNCIL OF CHEMICAL ASSOCIATIONS, http://www.responsiblecare.org (last visited Feb. 28, 2011).

3 *E.g.*, *Certification Scheme*, FOREST STEWARDSHIP COUNCIL, http://www.fsc.org/certification.html (last visited Feb. 28, 2011); *Energy Star*, U.S. ENVIRONMENTAL PROTECTION AGENCY, www.energystar.gov (last visited Feb. 28, 2011).

4 *E.g.*, the GLOBAL REPORTING INITIATIVE (GRI), SUSTAINABILITY REPORTING GUIDELINES (2006), *available at* http://www.globalreporting.org/ReportingFramework/G3Guidelines/; *see also* ACCOUNTABILITY, AA1000 ASSURANCE STANDARD (2008), *available at* http://www.accountability.org/standards/aa1000as/index.html.

schemes and green indexes.[5] These diverse schemes play an increasingly important role in the project of transnational environmental regulation.[6] My first objective in this Article is to give a portrait of this new global terrain of private environmental ordering. In particular, I will argue that the field of private transnational governance has been subject to a process of standardization and convergence, which has led to the creation of new global centres of governance. While these transnational regimes have evolved in a highly fragmentary and polycentric fashion,[7] there are, I will argue, multiple links and cross-sensitivities between the different regimes. These multiple cross-references have created a novel *ensemble regulatory structure*, with positive (network) enforcement and normative externalities.

The emergence of private environmental governance as an important transnational phenomenon raises two interrelated puzzles. The first puzzle involves the tension between the discursive facet of this process (the emergence of new normative clusters) and its ultimate environmental impact (in terms of its influence on firms' environmental behavior). Underlying this tension is a widespread skepticism regarding the capacity of these private ordering regimes to generate social change, reflecting a deep-seated suspicion toward "soft" legal instruments.[8] To some observers these private initiatives represent nothing but a façade of environmental regulation, part of a broader

5 Green financial schemes include codes regulating lending practices and "ethical" investment standards. Green indexes include, for example, the Dow Jones Sustainability Indexes and the FTSE4Good series.

6 Some of the foregoing instruments, such as the GRI GUIDELINES, *supra* note 4, also cover non-environmental issues. There are similar instruments covering other aspects of the corporate responsibility issue, such as SOCIAL ACCOUNTABILITY INTERNATIONAL (SAI), SA8000 (2008), *available at* http :// www.sa-intl.org/ _data/n_0001/resources/live/2008StdEnglishFinal.pdf (dealing with workers' rights); *see also* Sandra Waddock, *Building a New Institutional Infrastructure for Corporate Responsibility*, 22 ACAD. MGMT. PERSP. 87 (2008).

7 This process of polycentric evolution also characterizes other global domains. *See* Oren Perez, *Purity Lost: The Paradoxical Face of the New Transnational Legal Body*, 33 BROOK. J. INT'L L. 1 (2007); Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2003-2004).

8 *See, e.g.*, Suzanne Benn, Lindi Todd & Jannet Pendleton, *Public Relations Leadership in Corporate Social Responsibility*, 96 J. BUS. ETHICS 403 (2010); Graham Hubbard, Unsustainable Reporting, Paper presented to the CR Debates, The Royal Institution of Great Britain (London, Mar. 27 2009), *available at* http://www.corporateregister.com/crra/2008-ceremony/media/UnsustainableReporting.pdf.

"greenwash" ploy, whose only objective is to enable corporations to continue their ecologically destructive practices without disruption.[9]

I will argue, in contrast, that the way in which the concepts of "soft law" and "greenwash" are used in the academic literature and in popular discourse is analytically and empirically unconvincing. From an analytic perspective, the binary distinctions underlying these notions — soft law/hard law and greenwash/committed sustainability — do not capture the complexity of steering society through law. They fail to capture the nuanced nature of legal normativity, the multifaceted nature of the interaction between law and society, and the structural complexities of the modern corporation.[10] The all-or-nothing approach underlying these distinctions is also incompatible with the findings of numerous empirical studies that have examined the dynamic of transnational governance, as will be elaborated in Part II.A below.

The second puzzle reflects a contrary concern — that these private legal structures represent a new form of global authority that cannot be dismissed as normatively vacuous, and as such needs to be legitimized. Indeed, this question has already been the subject of wide-ranging social critique,[11] leading many of these transnational bodies to explore new mechanisms for

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9 For a definition of greenwash, see Thomas P. Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure Under Threat of Audit* (Ross Sch. Bus. Working Paper No. 1055, 2006), *available at* http://ssrn.com/abstract=938988; *Greenwash Fact Sheet*, CORPWATCH (Mar. 22, 2001), www.corpwatch.org/article.php?id=242. For a discussion of concrete "greenwash" cases, see Jason Allardyce & Danny Fortson, *Sir Sean Connery in 'Worst Ever Greenwash' Campaign*, SUNDAY TIMES, Jan. 31, 2010, *available at* http://www.timesonline.co.uk/tol/news/uk/scotland/article7009768.ece (criticizing Crédit Agricole's recent green campaign, *available at* www.credit-agricole.com/greenbanking/english (last visited Feb. 28, 2011)); THE COLLABORATIVE GREENWASHING INDEX, www.greenwashingindex.com (last visited Feb. 28, 2011); *Greenwash: Exposing False Environmental Claims*, GUARDIAN.CO.UK, www.guardian.co.uk/environment/series/greenwash (last visited Feb. 28, 2011).

10 Niklas Luhmann, *Limits of Steering*, 14 THEORY, CULTURE & SOC'Y 41 (1997); Oren Perez, *Regulation as the Art of Intuitive Judgment: A Critique of the Economic Approach to Environmental Regulation*, 4 INT'L J.L. CONTEXT 291 (2008); Waddock, *supra* note 6.

11 *See* Sander Chan & Philipp Pattberg, *Private Rule-Making and the Politics of Accountability: Analyzing Global Forest Governance*, 8 GLOBAL ENVTL. POL. 103 (2008); Birgitta Schwartz & Karina Tilling, *'ISO-Lating' Corporate Social Responsibility in the Organizational Context: A Dissenting Interpretation of ISO 26000*, 16 CORP. SOC. RESP. & ENVTL. MGMT. 289 (2009) (in the context of ISO 26000); Marianne Beisheim & Klaus Dingwerth, *Procedural Legitimacy and Private Transnational Governance: Are the Good Ones Doing Better?* (SFB Governance, Working Paper Series No. 14, 2008).

legitimization.[12] Because these transnational regimes operate in a new non-statal space, they need to carve a new vision of legitimacy and legal validity, which departs from the conventions of the Westphalian edifice, with its focus on the state as the exclusive source of authority. The extent of this cross-institutional quest for legitimacy is not only a mark of the increasing normative and epistemological significance of these regimes, but also reflects the fact that they increasingly conceive themselves as political agents, which need to provide justification for their claimed authority. This cross-institutional search for legitimacy also reflects a growing understanding that epistemological and political legitimacy are a prerequisite for continued membership in this global regulatory ensemble. Overall, this process of normative agglomeration has created a new transnational political space, carving new routes for political action.

The Article begins with an outline of this new global terrain, highlighting its ensemble structure and analyzing its unique properties (Part I). In this context, it explores the tension between the discursive and efficacy dimensions, offering a more nuanced conceptualization of the social dynamic of 'soft-law' regulation (Part II). This exploration leads to further consideration of the new political sphere, which was established by this ensemble network and its architecture of legitimization. The Article then turns its focus to the field of sustainability indexes, which are taken as a prototypical case of transnational private ordering (Part III). Sustainability indexes form an interesting case study because, despite their current high-profile, they have not received sufficient attention in the literature. The Article considers, first, the unique features of sustainability indexes as instruments of global governance, highlighting the paths through which these indexes claim to affect society. It then moves on to explore the mechanisms of legitimacy employed by the major players in this field, distinguishing between the two leading global players: FTSE4Good Index Series and Dow Jones Sustainability Indexes ("DJSI"). A close examination of sustainability indexes can generate insights, I will argue, regarding the field of private global environmental governance as a whole. In particular, it highlights both the new political opportunities created by the evolving network of transnational governance and the limits this new structure sets for radical critique.

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12 On the increasing importance of legitimacy at the transnational domain, see Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance Be Legitimate? An Analytical Framework*, 1 REG. & GOVERNANCE 347, 354 (2007).

I. ENSEMBLE REGULATION: ENVIRONMENTAL "PRIVATE ORDERING" AS A GLOBALIZED, INTERTWINED PROCESS

The emergence of private environmental schemes with global reach is a relatively new phenomenon. From the beginning of the 1980s to the mid-1990s, the field of private governance was highly fragmented, consisting of segregated contractual arrangements and uncoordinated organizational routines. However, since the mid-1990s the nature of the field has changed: new centers of global governance have emerged, transforming the field into a much more ordered domain. This change influenced all the facets of the governance game — from the norm-production process to implementation and enforcement. Further, these emerging regimes developed highly specified and articulated legal schemes, supported by intricate institutional structures. As such, the new regimes differ from some of the first-generation global codes, which lacked both the extensive specificity and the intricate institutional fabric that characterize their second-generation successors.[13] The increasing importance of private environmental schemes can be linked to the rise of regulatory capitalism as the predominant form of capitalism at the beginning of the twenty-first century.[14]

One of the unique features of the emerging field of private environmental governance is the multiple links and cross-sensitivities between the distinct regimes, constituting what I call an *ensemble regulatory structure*. This ensemble structure characterizes, in particular, the corporate social responsibility (CSR) universe; it involves those instruments that seek to regulate *generic* aspects of the modern corporate economy, drawing on a vision of sustainability (*CSR instruments*). By ensemble regulation, I refer

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13 Two good examples of first-generation codes are the Ceres Principles and the Global Sullivan Principles. *See Ceres Principles*, CERES, http://www.ceres.org/Page.aspx?pid=416 (last visited Feb. 28, 2011); *The Global Sullivan Principles of Social Responsibility*, LEON H. SULLIVAN FOUDATION, http://www.thesullivanfoundation.org/about/global_sullivan_principles (last visited Feb. 28, 2011).

14 David Lazer, *Regulatory Capitalism as a Networked Order: The International System as an Informational Network*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 52 (2005); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005); Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 ANN. REV. L. & SOC. SCI. 45 (2009); John Bradford Braithwaite, *Neoliberalism or Regulatory Capitalism* (RegNet Occasional Paper No. 5, 2005), *available at* http://ssrn.com/abstract=875789.

to a collection of autonomous regulatory schemes that form a regulatory network, clustering around a common core of basic principles and exhibiting positive enforcement and normative externalities. There are, in other words, positive complementarities among the ensemble's subsystems with respect both to their impact on firms' behaviour and to the normative standing of their core principles.

The emergence of this kind of positive network externality is not a necessary consequence of the process of polymorphosis — the parallel evolution of autonomous legal structures with a common conceptual core.[15] Indeed, various observers have pointed to the risks of the fragmentation of the international legal realm, which could possibly lead to frictions, inconsistencies and pathological paralysis.[16] The fact that these various schemes all operate within a common subject-matter domain — environmental regulation — is a necessary, but not sufficient, condition for the emergence of ensemble regulation.[17] It is beyond the scope of this Article to examine in detail the process that generated this unique ensemble structure in the CSR universe. I can offer two tentative observations. First, the idea of sustainable development provided the different regimes with a common ideological framework, minimizing potential frictions. A second point concerns the institutional characteristics of this regulatory ensemble. First, the non-statal nature of the transnational institutions involved in this network has allowed them to transcend the national frictions that tend to haunt treaty-based regimes.[18] Second, the fact that the distinct regimes composing the ensemble have evolved in a *non-imperialistic* fashion, each capturing a

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15 For the concept of polymorphosis, albeit in a completely different context, see Paul Ilie, *Polymorphosis in Sade*, 38 SYMP. 3 (1984).

16 Eyal Benvenisti & George W. Downsy, The *Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004); Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2001); Waddock, *supra* note 6, at 106.

17 A good counterexample is the field of international trade law, in which the proliferation of bilateral free-trade treaties poses an increasing risk to the multilateral framework of the WTO. *See* Jagdish Bhagwati, *Reshaping the WTO*, 168 FAR E. ECON. REV. 25 (2005).

18 In the context of the global trade regime, see James Scott & Rorden Wilkinson, *What Happened to Doha in Geneva? Re-Engineering the WTO's Image While Missing Key Opportunities*, 22 EUR. J. DEV. RES. 141 (2010); Bernard Hoekman, *The Doha Round Impasse and the Trading System*, VOX (June 19, 2010), *available at* http://www.voxeu.org/index.php?q=node/5206.

different segment of the CSR universe, has reduced the competitive tensions between the institutions, thereby facilitating the emergence of a synergic structure.

In the following section I provide a sketch of the historical transformation that led to the current configuration, highlighting the cross-sensitivities between the distinct regimes. In this context I would draw on three key examples: ISO 14001, the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, and sustainability indexes (with a special focus on the latter). What is common to these examples is that they all have an elaborated normative structure, supported by a developed institutional framework.[19]

A. ISO 14001 and Environmental Management Systems

Consider first the field of environmental management systems (EMS), which is dominated by the ISO 14001 environmental management system.[20] ISO 14001 is a set of procedures and organizational practices, which are used to assist an organization in achieving its environmental goals through a process of continual improvement. The ISO 14001 scheme is supported by a broad system of external certification and auditing that draws on the institutional support of the International Organization for Standardization, and the National Standards Institutions affiliated with it. This private enforcement system is perceived, despite various limitations, as being relatively trustworthy and efficient.[21]

Before the publication of ISO 14001, countries employed numerous and often conflicting sets of environmental management programs.[22] ISO 14001

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19 By insisting on these two features, I exclude from my domain of interest a significant number of global initiatives, which lack one or the other. For a less restrictive portrait of this global private network, see Waddock, *supra* note 6.

20 ISO 14001, *supra* note 2. For further guidelines regarding the implementation of ISO 14001 EMS, see INTERNATIONAL STANDARDS ORGANIZATION (ISO), ISO 14004 ENVIRONMENTAL MANAGEMENT SYSTEMS — GENERAL GUIDELINES ON PRINCIPLES, SYSTEMS AND SUPPORT TECHNIQUES (2004).

21 These limitations include, in particular, limited sanctions and lack of transparency. It should be noted that ISO 14001 gives organizations the freedom to choose between self-certification and third-party certification and evaluation, although an increasing number of organizations have chosen the latter option. *See* Matthew Potoski & Aseem Prakash, *Covenants with Weak Swords: ISO 14001 and Facilities' Environmental Performance*, 24 J. POL'Y ANALYSIS & MGMT. 745 (2005); Michael W. Toffel, *Resolving Information Asymmetries in Supply Chains: The Role of Certified Management Programs* (UC Berkeley, Hass Sch. Bus., Working Paper No. 19, 2005), *available at* http://ssrn.com/abstract=809406.

22 Steven A. Melnyk, Robert P. Sroufe & Roger Calantone, *Assessing the*

has, however, quickly positioned itself as the most prominent global EMS standard.[23] The standard has received strong support from large multinational enterprises (MNEs), especially in environmentally conscious countries.[24] Up to the end of December 2008, 188,815 certificates had been issued in 155 countries, reflecting a steady year to year increase.[25] The adoption of ISO 14001 as the EMS of the EU EMAS scheme is another reflection of its global success.[26] The rapid global diffusion of ISO 14001 has been associated with several factors, ranging from trade and investment flows[27] to demand from environmental NGOs.[28] Prakash and Potoski argue that in addition to creating instrumental incentives for local firms to join ISO 14001, foreign direct investment and trading networks may also serve to diffuse ideas and normative expectations about environmental policies as enshrined in the standard.[29]

The ISO 14001 scheme does not refer particularly to external standards

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Impact of Environmental Management Systems on Corporate and Environmental Performance, 21 J. OPERATIONS MGMT. 329, 330 (2003); Virginia Haufler, *Negotiating International Standards for Environmental Management Systems: The ISO 14000 Standards*, GLOBAL PUBLIC POLICY CASE STUDIES 7-9 (2000), http://www.gppi.net/fileadmin/gppi/Haufler_ISO_14000.pdf.

23 Paulo Albuquerque, Bart J. Bronnenberg & Charles J. Corbett, *A Spatiotemporal Analysis of the Global Diffusion of ISO 9000 and ISO 14000 Certification*, 53 MGMT. SCI. 451 (2007).

24 Kimitaka Nishitani, *Demand for ISO 14001 Adoption in the Global Supply Chain: An Empirical Analysis Focusing on Environmentally Conscious Markets*, 32 RESOURCE & ENERGY ECON. 395 (2010).

25 Richard Perkins & Eric Neumayer, *Geographic Variations in the Early Diffusion of Corporate Voluntary Standards: Comparing ISO 14001 and the Global Compact*, 42 ENV'T & PLAN. A 347 (2010); INTERNATIONAL STANDARDS ORGANIZATION (ISO), THE ISO SURVEY OF CERTIFICATIONS 2008, at 12 (2009), *available at* http://oudarlesteyn.nl/nieuws/ISO%20survey%20certifications%202008.pdf.

26 *See* EMAS Regulation, *supra* note 2, Annex II.

27 Perkins & Neumayer, *supra* note 25, at 28-29.

28 Eric Neumayer & Richard Perkins, *What Explains the Uneven Take-Up of ISO 14001 at the Global Level? A Panel-Data Analysis*, 36 ENV'T & PLAN. A 823, 835-36 (2004).

29 ASEEM PRAKASH & MATTHEW POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS (2006) [hereinafter PRAKASH & POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS]; Aseem Prakash & Matthew Potoski, New Dependencies: FDI and the Cross-Country: Diffusion of ISO 14001 Management Systems, paper presented at the First Annual Conference on Institutional Mechanisms for Industry Self-Regulation, Tuck Sch. Bus., Dartmouth C. (Feb. 24-25, 2006), *available at* http://mba.tuck.dartmouth.edu/mechanisms/pages/Papers/prakash-potoski%20paper.pdf [hereinafter Prakash & Potoski, New Dependencies].

(as we will see below, it is frequently referred to by other standards). However, its structure offers several linkage points with other schemes. Thus, for example, while ISO 14001 does not require certified organizations to publish an environmental report, the requirement to establish an internal system of monitoring provides the informational platform, which is a prerequisite for producing environmental reporting that draws, for example, on the GRI Guidelines.[30] Another example concerns the relationship between the organization and its external stakeholders. The standard requires certified organizations to develop communication strategies with external stakeholders; specifically, organizations are required to create a procedure for "receiving, documenting and responding to relevant communication from external interested parties."[31] In developing their communication strategies, firms can draw on external standards such as the 2011 AA1000 Stakeholder Engagement Standard (AA1000SES).[32]

B. Sustainability Reporting: The GRI Guidelines

Another example of the globalization of private environmental standards is the field of sustainability reporting, which has undergone a similar transformation from fragmented self-regulation to centralized global governance. Firms, especially MNEs, have been publishing non-financial information since the 1980s. However, these social-environmental reports varied greatly in their style and form.[33] While there was a process of convergence and reciprocal learning between firms,[34] there was no central coordination.

The disordered landscape of the 1990s has been transformed over the last ten years into a much more ordered domain, with the emergence of global private codes that set out clear rules for sustainability reporting and external assurance. The most important code is the set of reporting standards produced by the GRI. The GRI published its first set of guidelines for

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30 *See* ISO 14001, *supra* note 2, §§ 4.5.1-4.5.2l; ISO 14004, *supra* note 20, § 4.5.1.

31 *See* ISO 14001, *supra* note 2, §§ 4.4.3, 4.6(b).

32 ACCOUNTABILITY, STAKEHOLDER ENGAGEMENT STANDARD: EXPOSURE DRAFT (2005), *available at* http://www.accountability.org/images/content/0/4/047/SES%20Exposure%20Draft%20-%20FullPDF.pdf.

33 Josephine Maltby, *Setting Its Own Standards and Meeting Those Standards: Voluntarism Versus Regulation in Environmental Reporting*, 6 BUS. STRATEGY & ENV'T 83 (1997); Waddock, *supra* note 6, at 93.

34 Carol Ann Tile, *The Content and Disclosure of Australian Corporate Environmental Policies*, 14 ACCT. AUDITING & ACCOUNTABILITY J. 190 (2001).

sustainability reporting in 2002; the last version was published in 2006.[35] The GRI Guidelines dominate the global market of sustainability reporting, with a particularly strong influence over the disclosure practices of MNEs.[36] The objective of the GRI Guidelines is to provide a "trusted and credible framework for sustainability reporting that can be used by organizations of any size, sector, or location," and to facilitate clear and open communication about sustainability using a "globally shared framework of concepts, consistent language, and metrics."[37] The 2006 Guidelines require organizations to provide information on the economic, environmental, and social aspects of their activities. The GRI Guidelines refer to external standards, by requiring organizations to list all the external economic, environmental, and social codes to which they subscribe, including any environment-related performance or certification system.[38] The GRI Guidelines offer two complementary compliance mechanisms.[39] GRI can check the reporter's self-declaration of its reporting application level. Another alternative is to have the report reviewed by a third party.[40]

The growth of the market of sustainable reporting has generated a substantial demand for independent external assurance.[41] Two prominent global codes that seek to regulate the emerging field of external assurance are the International Standard on Assurance Engagements (ISAE 3000)

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35 GLOBAL REPORTING INITIATIVE (GRI), SUSTAINABILITY REPORTING GUIDELINES (2002) [hereinafter GRI 2002 GUIDELINES]; GLOBAL REPORTING INITIATIVE (GRI), SUSTAINABILITY REPORTING GUIDELINES (2006) [hereinafter GRI 2006 GUIDELINES]. In the following discussion I will refer to the 2006 guidelines.

36 KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING (2008). For a comprehensive list of firms using the GRI guidelines, see *GRI Reports List*, GLOBAL REPORTING INITIATIVE, www.globalreporting.org/GRIReports/GRIReportsList (last visited Dec. 15, 2010).

37 GRI 2006 GUIDELINES, *supra* note 35, at 8, 25-34; GRI 2002 GUIDELINES, *supra* note 35, at 9, 34.

38 GRI 2006 GUIDELINES, *supra* note 35, at 23, 27.

39 *Id*. at 1-2.

40 GRI checks for the presence or absence of the criteria in the report that corresponds to the report maker's self-declared Application Level. The GRI Application Level check does not represent GRI's view on the quality of the report and its content; it is simply a statement about the extent to which the GRI Reporting Framework was utilized. In contrast, external assurance is expected to assess whether the report provides a reasonable and balanced presentation of performance, taking into consideration the veracity of data in a report as well as the overall selection of content. *See id*. at 5, 38.

41 Roger Simnett, Ann Vanstraelen & Wai Fong Chua, *Assurance on Sustainability Reports: An International Comparison*, 84 ACCT. REV. 937 (2009).

promulgated by the International Auditing and Assurance Standards Board,[42] and the AccountAbility AA1000 Assurance Standard.[43]

The process of global convergence within the fields of environmental reporting and external assurance was supported by two intertwined processes. The first was the incorporation of disclosure requirements in other private CSR instruments. Thus, for example, the EU EMAS scheme,[44] Responsible Care,[45] and the Equator Principles,[46] all include extensive disclosure requirements. Disclosure requirements also form part of the evaluative criteria used by FTSE4Good and the Dow Jones Sustainability Index series (DJSI).[47]

Governmental intervention has provided a second line of support. First, national securities regulators, such as the U.S. Securities and Exchange Commission, have started to require more extensive disclosure of environmental data.[48] Second, sustainable reporting has also been supported by the emergence of mandatory environmental disclosure programs.[49] The GRI scheme, however, goes beyond the requirements of these state-sponsored

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42 INTERNATIONAL AUDITING AND ASSURANCE STANDARDS BOARD, INTERNATIONAL STANDARD ON ASSURANCE ENGAGEMENTS (ISAE) 3000: ASSURANCE ENGAGEMENTS OTHER THAN AUDITS OR REVIEWS OF HISTORICAL FINANCIAL INFORMATION (2005), *available at* http://www.accountability21.net/uploadedFiles/Issues/ISAE_3000.pdf.

43 ACCOUNTABILITY, AA1000 ASSURANCE STANDARD 2008 (2008), *available at* http://www.accountability.org/images/content/0/5/056/AA1000AS%202008.pdf.

44 EMAS Regulation, *supra* note 2, Annex IV.

45 Responsible-Care, *2008 Status Report* 19-25 (2009), *available at* http://www.responsiblecare.org/filebank/Status%20Report%2001_05.pdf.

46 THE "EQUATOR PRINCIPLES": A FINANCIAL INDUSTRY BENCHMARK FOR DETERMINING, ASSESSING AND MANAGING SOCIAL & ENVIRONMENTAL RISK IN PROJECT FINANCING, PRINC. 10 (2006), *available at* http://www.equator-principles.com/documents/Equator_Principles.pdf. *See also Disclosure Based on EP 10*, EQUATOR PRINCIPLE, http://www.equator-principles.com/reporting.shtml (last visited Feb. 28, 2011).

47 *See* FTSE, THE INDEX COMPANY, FTSE4GOOD INDEX SERIES INCLUSION CRITERIA 3 (2006), *available at* http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_In clusion_Criteria.pdf; DOW JONES SUSTAINABILITY INDEXES, DOW JONES SUSTAINABILITY WORLD INDEX GUIDE BOOK, VERSION 11.4, at 11 (2010), *available at* http://www.sustainability-index.com/djsi_pdf/publications/Guidebooks/DJSI_World_Guidebook_11_4.pdf.

48 *See, e.g.*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (EPA), ENFORCEMENT ALERT 4 (2001), *available at* http://www.epa.gov/compliance/resources/newsletters/civil/enfalert/sec.pdf; Oren Perez, *Facing the Global Hydra: Ecological Transformation at the Global Financial Frontier: The Ambitious Case of the Global Reporting Initiative*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 459, 468-70 (Christian Joerges ed., 2006).

49 *See, e.g.*, *Toxics Release Inventory Program*, UNITED STATES ENVIRONMENTAL

disclosure programs, by extending the disclosure requirements to ethical and labor issues, by expanding the scope and scale of the ecological data that must be disclosed, and by not basing the disclosure requirement on an economically defined notion of materiality.[50]

C. Sustainability Indexes

A third example of private ordering "going global" is the field of sustainability indexes. These indexes should be considered in the broader context of the new movement of socially responsible investment (SRI). SRI is the "process of identifying and investing in companies that meet certain baseline standards or criteria of Corporate Social Responsibility (CSR)."[51] From a legal perspective, SRI represents a form of private rule-making, in which private investors contract with financial institutions to invest on their behalf, subject to certain investment rules that are designed by the financial institution. It is thus a process of both *self-regulation* and *standard contracting*. This process has evolved in a highly fragmented environment,[52] with each financial institution devising its own set of investment criteria, sometimes relying on external consultancies.[53] This disordered picture has

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PROTECTION AGENCY, www.epa.gov/tri (last visited Dec. 15, 2010); THE EUROPEAN POLLUTION EMISSIONS REGISTER, http://prtr.ec.europa.eu/ (last visited Dec. 15, 2010); *National Pollutant Release Inventory*, ENVIRONMENT CANADA http://www.ec.gc.ca/inrp-npri (last visited Dec. 15, 2010).

50 Several European countries have taken a more radical step by adopting regulations requiring large or state-owned companies to publish sustainability reports. *See, e.g.*, Lene Espersen, Danish Minister for Economic and Business Affairs, *Proposal for an Act amending the Danish Financial Statements Act (Report on social responsibility for large businesses)* (Oct. 8 2008), *available at* www.eogs.dk/graphics/Samfundsansvar.dk/Dokumenter/Proposal_Report_On_Social_Resp.pdf; STEVE LYDENBERG & KATIE GRACE, INNOVATIONS IN SOCIAL AND ENVIRONMENTAL DISCLOSURE OUTSIDE THE UNITED STATES, REPORT PREPARED FOR DOMINI SOCIAL INVESTMENTS (2008), *available at* http://www.domini.com/common/pdf/Innovations_in_Disclosure.pdf.

51 Social Investment Forum, *2005 Report on Socially Responsible Investing Trends in the United States: 10-Year Review*, 2 (2006), *available at* http://www.socialinvest.org/pdf/research/Trends/2005%20Trends%20Report.pdf.

52 EU-COMMISSION, GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY 20-21 (2001).

53 For concrete examples, see *Green Funds*, JUPITER, www.jupiteronline.co.uk/PI/Our_Products/Green_Funds/Green+Funds.htm (last visited Dec. 17, 2010); *Corporate Responsibility Report 2009*, FRIENDS PROVIDENT, http://www.friendsprovident.com/cr/ (last visited Dec. 17, 2010).

changed with the evolution of new centers of governance. I will focus here on the role of sustainability indexes in this new governance field.[54]

The primary providers of sustainability indexes are the Dow Jones Indexes and the FTSE Group, the world leaders in the stock index market. I will defer the detailed discussion of these instruments to the third Part of the Article. At this stage I would just like to highlight the way in which these regimes fit into the ensemble structure described above. The ranking criteria used by both indexes include various references to other global codes.[55] Thus, for example, the FTSE4Good Inclusion Criteria state that high-impact companies with ISO or EMAS certification are considered to meet several core indicators, which are required from such companies; such firms are also subject to stricter disclosure requirements.[56] The Dow Jones ranking process, as reflected in the Corporate Sustainability Assessment Questionnaire which is sent to firms as part of the ranking process, similarly emphasizes the existence of EMS certification and the firm's commitment to environmental (and social) reporting.[57]

The global convergence process depicted above is captured by the following table.

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54 For further discussion, see Oren Perez, *The New Universe of Green Finance: From Self-Governance to Multi-Polar Governance*, *in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE IN TRANSNATIONAL ECONOMIC TRANSACTIONS 151 (Olaf Dilling, Martin Herberg & Gerd. Winter eds., 2008).

55 *See* Aaron K. Chatterji & David I. Levine, *Breaking Down the Wall of Codes: Evaluating Non-Financial Performance Measurement*, 48 CAL. MGMT. REV. 29 (2006).

56 FTSE, *Supra* note 47, at 3.

57 *See* SAM Group, *Research Corporate Sustainability Assessment Questionnaire*, questions 38-41 (2009) (on file with author).

Table 1: the Universe of Global Private Environmental Ordering (Partial Picture[58])

Field	Past Governance Structure	Current Governance Structure: Global Code	Level of Specificity	Responsible Organization	Compliance Mechanisms
Environmental Management	Uncoordinated, organizational management programs	ISO 14001, Responsible Care	High	International Organization for Standardization (ISO), International Council of Chemical Associations (ICCA)	Private external verification (relatively robust in the case of ISO 14001)
Environmental Impact Assessment in the Private Financial Sector	Uncoordinated, organizational risk-assessment schemes	Equator Principles	High	Joint Governance by Participating Banks	Voluntary reporting mechanism (e.g., Equator Principles, principle 10)
Sustainability Reporting	Uncoordinated, organizational disclosure formats	GRI Guidelines[59]	High	Global Reporting Initiative	GRI (documents check), Private External Assurance (drawing on global codes)
Assurance Practices	None	ISAE 3000, AA1000 Assurance Standard	High	the International Auditing and Assurance Standards Board; AccountAbility	None
Sustainability Indexes	None	FTSE4Good, DJSI	High	FTSE, Dow Jones	Private compliance governed by FTSE and Dow Jones and drawing on external consultants (Eiris and SAM)[60]

58 For additional codes which were not included in the table for lack of space, see Bernstein & Cashore, *supra* note 12, at 369-71.

59 There are close links between the Equator Principles and the GRI Financial Services Sector Supplement.

60 See *infra* Part III, for further discussion of the role Eiris and SAM in this context.

Green labels — sustainable forests	None	Forest Stewardship Council global label[61]	High	Forest Stewardship Council	Independent certification bodies accredited by the Forest Stewardship Council

II. GREENWASH OR DOUBLE THINK: THE SOCIO-LEGAL DYNAMIC OF THE NEW ENSEMBLE REGULATION

> Greenwash: Disinformation disseminated by an organization, etc., so as to present an environmentally responsible public image.[62]

> Doublethink: Winston sank his arms to his sides and slowly refilled his lungs with air. His mind slid away into the labyrinthine world of doublethink. To know and not to know, to be conscious of complete truthfulness while telling carefully constructed lies, to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them, to use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again: and above all, to apply the same process to the process itself. That was the ultimate subtlety: consciously to induce unconsciousness, and then, once again, to become unconscious of the act of hypnosis you had just performed. Even to understand the word 'doublethink' involved the use of doublethink.[63]

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61 There is some competition between ISO 14001 and the FSC rules. *See* Christina Stringer, *Forest Certification and Changing Global Commodity Chains*, 6 J. ECON. GEOGRAPHY 701 (2006).

62 FUTERRA SUSTAINABILITY COMMUNICATIONS, THE GREENWASH GUIDE 8 (2008) (quoting OXFORD CONCISE ENGLISH DICTIONARY (10th ed. 2002)).

63 GEORGE ORWELL, 1984, at 36 (1949), *available at* www.george-orwell.org/1984/2.html.

A. Graded Normativity, Network Effects and the Dynamic of Social Change

Private environmental codes have undoubtedly captured a highly visible place in the global arena. But what exactly is the nature of this beast? Is it just another case of greenwash — an environmental variant of Orwell's doublethink? I will argue that there is more to that beast than empty words, and that the use of the concepts of "soft law" and "greenwash" in the context of private environmental governance is conceptually and empirically unconvincing.

Let me first elaborate what is problematic with these notions at the conceptual level. The soft law/hard law distinction, as it is commonly invoked, is overshadowed by a positivist, crisp concept of legal normativity. Taking the positivist conceptualization as a premise entails a reinterpretation of the soft law/hard law distinction in terms of a juxtaposition between law and non-law, making the reliance on soft law as a means of generating social change somewhat suspicious.[64] This binary interpretation of legal normativity is, however, not more than a working hypothesis.[65] It disregards the possibility of conceptualizing legal normativity as a fuzzy concept (or predicate) which may be realized in degrees.[66] "Softness" under this alternative conceptualization does not designate a state of lawlessness, but a state of graded normativity, with differing levels of normative force. This interpretation invites us to understand legal normativity in terms of a continuum closed by the two ideal types of "non-law" and "crisp" (or absolute) law. In-between one finds varying degrees of softness/hardness. The normative force of a legal regime — its degree of hardness/softness —is determined by a multidimensional matrix, composed of various institutional dimensions, such as the existence of independent legal tribunals (and the extent of their independence), the dynamic of institutional reflexivity (e.g.,

64 *See, e.g.*, Schwartz & Tilling, *supra* note 11 (with respect to ISO 26000).

65 In the sense offered by John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1914).

66 The approach presented above — a graded view of vagueness — draws on fuzzy logic. *See* Vilem Novak, *Are Fuzzy Sets a Reasonable Tool for Modeling Vague Phenomena?*, 156 FUZZY SETS & SYS. 341 (2005); Lotfy A. Zadeh, *Outline of a New Approach to the Analysis of Complex Systems and Decision Processes*, 3 IEEE TRANSACTIONS SYS. MAN & CYBERNET 28 (1973).

the existence of an appeal procedure), and more.[67] The structure of the matrix is itself contingent; it is subject to social construction.

What are the operational implications of this more nuanced conception of legality? First, it anticipates that soft legal structures could generate normative expectations, although their strength may vary.[68] Further, these normative expectations are also likely to be picked up as themes for communication, generating a rich and self-sustained communicative dynamic. Second, the fuzzy conceptualization of normativity needs to be situated also in a more complex understanding of the ways in which law can effectuate social change. Regulatory intervention can have multiple effects: behavioral, organizational, discursive and psychological; the study of the social impact of fuzzy legal structures has to be conducted within this nuanced framework. The foregoing critique receives support from the empirical literature which has studied private global environmental regimes. This literature exposes a complex social dynamic that cannot be explained through simple binary distinctions such as soft law/hard law. Generally, one finds within the literature evidence that soft legal instruments succeed in effectuating social change — across a wide range of social variables.[69]

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67 For different attempts to define this matrix, see for example, Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000); Martha Finnemore & Stephen J. Toope, *Alternatives to "Legalization": Richer Views of Law and Politics*, 55 INT'L ORG. 751 (2001); Sylvia I. Karlsson-Vinkhuyzen & Antto Vihma, *Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework*, 3 REG. & GOVERNANCE 400 (2009); John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, *in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 3 (John J. Kirton & Michael J. Trebilcock eds., 2004).

68 This requires us to fuzzify also the systems-theory distinction between normative and cognitive expectations. For the system-theory view, see Gunther Teubner, *Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1449-50 (1991-1992). One has to distinguish in this context also between the psychic and social processing of expectations. *See* EMILIOS A. CHRISTODOULIDIS, LAW AND REFLEXIVE POLITICS 122 (1998).

69 Although the impact could vary between schemes. *See, e.g.*, Bernstein & Cashore, *supra* note 12; Aaron K. Chatterji & Michael W. Toffel, *How Firms Respond to Being Rated*, 31 STRATEGIC MGMT. J. 917 (2010); Oren Perez, Yair Amichai-Hamburger & Tammy Shterental, *The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior*, 43 LAW & SOC'Y REV. 593 (2009); Waddock, *supra* note 6, at 105; Rieneke Slager, What Gets Measured Gets Managed: Exploring the Link Between Sustainability Indices and Responsible Corporate Behaviour, paper presented at Oikos PRI Young Scholars Academy: Responsible Investment: Integration, Engagement, Transparency (2009).

The interaction between the new normative order generated by private environmental regimes and the internal world of global firms is also influenced by the ensemble structure of the transnational CSR regulatory universe. This influence has two aspects. First, the cross-linkages between the different standards create a system of *positive enforcement externalities*, in which the compliance mechanisms of each regime also serve as an enforcement agent of the other regimes in the network, generating an amplified compliance effect. The consequence of this effect is that firms entering into the world of CSR will find it increasingly more difficult to reap the reputational gains associated with voluntary CSR codes without undertaking real organizational efforts.[70] Once a firm starts publishing environmental reports drawing on the GRI guidelines, adopts a certified EMS (ISO 14001 or Responsible Care), incorporates EIA principles such as the Equator Principles, and enters the reputable list of either FTSE4Good or DJSI, it becomes increasingly more difficult to renege on its multidimensional commitments. Ensemble regulation makes it therefore much more difficult to maintain a schizophrenic decoupling between the organization's stated policies and its (actual) internal culture.[71]

But the ensemble structure of this new private order has also another, more subtle effect. There is a positive feedback between the multi-focal invocation of the idea of sustainability across the ensemble, the social standing of the idea as a moral-political principle, and the perceived legitimacy of the ensemble and each of its constituent regimes. The mutual engagement with the concept of sustainability through the distinct regime-spaces and the normative cross-reference it facilitates is thus a source of positive normative externality.

The soft law/greenwash conceptualization is further undermined by a new political sphere that is evolving around these new CSR instruments. This new and intricate political universe is constituted by an extensive, cross-institutional quest for legitimacy. All of the institutions that were described in the previous part are engaged in some form of legitimacy-building, drawing on both political and epistemic mechanisms. Thus, for example, the GRI has developed a complex, multi-stakeholder governance structure, which, as the GRI notes, "helps GRI to retain the credibility it has

70 This cross-regime effect is neglected by some authors. *See, e.g.*, Schwartz & Tilling, *supra* note 11, at 296.

71 For the notion of decoupling, see Peer C. Fiss & Edward J. Zajac, *The Symbolic Management of Strategic Change: Sensegiving Via Framing and Decoupling*, 49 ACAD. MGMT. J. 1173, 1175 (2006).

established for the guidance in the Framework."[72] AccountAbility has used an innovative Wiki, supported by offline meetings held at various countries around the world, to develop its new set of global assurance and engagement standards.[73] In developing its new CSR standard — ISO 26000 — ISO has established a process that seeks to ensure broad stakeholder engagement and to facilitate participation of stakeholders with limited resources, such as developing countries, non-governmental organizations and consumers.[74] While these efforts may fail to meet the expectations of utopian democratic theory,[75] they have jointly generated a new domain of ensemble politics with new political addressees and channels of action.[76] It seems hard to make sense of this emerging political universe if we take the matrix of CSR instruments to be nothing but "cheap talk."

B. The Multifaceted Nature of the Corporate Order — the Polyphonic Organization

The distinction between greenwash and committed sustainability, which is commonly invoked in the context of the social critique of soft law instruments, is based on a simplistic understanding of the modern corporation. This distinction invites us to choose between two equally implausible portraits of the firm: a completely *amoral* corporate machine driven solely by a search for profits (the *economic-optimizer corporation*), set against an ideal image of a *benevolent corporation*, driven by an absolute desire to do good, unconcerned with profit calculations. Neither of these ideal-types makes sense from a sociological perspective.[77]

The model of the firm as amoral optimizer leads to a highly skeptical view

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72 *Governance Bodies*, GLOBAL REPORTING INITIATIVE, www.globalreporting.org/AboutGRI/WhoWeAre/GovernanceBodies/GovernanceBodiesLandingPage.htm (last visited Dec. 19, 2010).

73 *AA1000 Stakeholder Engagement Standard: Revision Process*, ACCOUNTABILITY, http://accountabilityaa1000wiki.net/ (last visited Dec. 19, 2010).

74 T.M. Egyedi & S. Toffaletti, *Standardising Social Responsibility: Analysing ISO Representation Issues from an SME Perspective*, *in* PROCEEDINGS 13TH EURAS WORKSHOP ON STANDARDISATION 121 (K. Jakobs & E. Soederstroem eds., 2008); *see also organization*, SOCIAL RESPONSIBILITY, http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/04_organization/org_str.html (last visited Dec. 19, 2010).

75 *See, e.g.*, Schwartz & Tilling, *supra* note 11.

76 *See* Bernstein & Cashore, *supra* note 12, at 353.

77 Rejecting these simplistic conceptualizations puts into question other derivative distinctions such as the distinction between absolute sincerity and absolute suppression. This distinction is incompatible with the disclosure practices of the

of the capacity of soft-law instruments to trigger behavioral change.[78] In this context, economic writers distinguish between economically justified CSR — *strategic CSR* — and *altruistic CSR*, which requires firms to forgo profits.[79] Under the economic-optimizer model, firms will never adopt altruistic CSR;[80] CSR instruments are not expected to have any effect on corporate behavior unless this effect could also be justified by normal business considerations.[81] But this argument is inconsistent with the empirical evidence, which demonstrates that the effect of CSR instruments cannot be explained solely through economic considerations.[82]

The model of the corporation as *benevolent* is similarly problematic because it does not give sufficient regard to the economic constraints that characterize the corporate order. It leads to a view of CSR as a purely normative prescription — stating that managers ought to pursue the interests of multiple stakeholders, not just those of shareholders.[83] By distancing itself to such a degree from the brutal economic reality facing economic players,

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CSR world, which is one of degrees, as illustrated in the GRI model of varied application levels. *See* GRI 2006 GUIDELINES, *supra* note 35, at 2.

78 *See* Bernstein & Cashore, *supra* note 12, at 354.

79 Thomas P. Lyon & John W. Maxwell, *Corporate Social Responsibility and the Environment: A Theoretical Perspective*, 2 REV. ENVTL. ECON. & POL'Y 240, 241 (2008); Forest L. Reinhardt, Robert N. Stavins & Richard H. K. Vietor, *Corporate Social Responsibility Through an Economic Lens*, 2 REV. ENVTL. ECON. & POL'Y 219 (2008).

80 Further, from this perspective altruistic CSR is viewed as a case of corporate-governance failure, generated by the ability of under-monitored managers to use corporate resources to advance their ideological agenda. Altruistic CSR is, from this perspective, not very different from the "greed capitalism" which fueled the 2009 financial crisis. The solutions are also similar: the adoption of organizational or incentive-based mechanisms, ensuring that the incentives of the firm's managers and shareholders are aligned. *See* Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247 (2010); Joseph Stiglitz, *Regulation and Failure*, *in* NEW PERSPECTIVES ON REGULATION 11 (David Moss & John Cisternino eds., 2009).

81 Potoski and Prakash's "green club" model, which highlights the reputational benefits of certain voluntary schemes, such as ISO 14001, and Gunningham et al.'s "social license" model, are two examples of attempts to explain the adoption of voluntary codes through economic logic. *See* PRAKASH & POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS, *supra* note 29; Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 329 (2004); Prakash & Potoski, New Dependencies, *supra* note 29.

82 Perez, Amichai-Hamburger & Shterental, *supra* note 69.

83 *See* Thomas Donaldson, *Making Stakeholder Theory Whole*, 24 ACAD. MGMT. REV. 237, 238 (1999).

this model loses its force both as a normative precept and as a sociological narrative.

Replacing these two ideal-type models with a more nuanced view of the firm offers a better starting point for thinking (sociologically!) about the complex interaction between soft law instruments and the corporate order. In this context, I want to highlight one alternative model of the firm — the *polyphonic model*.[84] The polyphonic model conceptualizes the firm as a dynamic, self-organized decisions-processing system, which can accommodate multiple logics.[85] These parallel logics coexist in a *dynamic equilibrium*, which enmeshes together economic, environmental and other goals. While this model assumes that firms can host a variety of rationalities, only a limited combination of goals and routines offers a *viable trajectory* for the firm, given the external constraints it faces. Firms can be viable, however, without being economic optimizers. The tension between the different logics is not resolved by some meta-theory (whether economic optimization, ecological ethics, or other), but through pragmatic micro decisions and decisions rules in various sections of the organizations (which may generate spatial and temporal inconsistencies).

The polyphonic model provides a more open-ended framework for thinking about the reasons why firms adopt voluntary schemes and the impact of such schemes on firms' behavior and internal structure. First, recognizing the possibility that firms are governed by multiple logics allows for the possibility that a decision to adopt a CSR code will not be driven by economic considerations alone. Second, the polyphonic model also better captures the institutional dynamic generated by CSR instruments. The adoption of standards such as ISO 14001, the Equator Principles or the GRI Guidelines can change the firm's internal dynamic, moving it into *a more environmentally sensitive equilibrium trajectory*. This change is generated through the various routines that these standards introduce into the firm's internal structure. New routines for selecting, ordering and

84 Perez, Amichai-Hamburger & Shterental, *supra* note 69.

85 The model draws on Niklas Luhmann's communication-based theory of social systems, and on Richard Nelson's concept of "social technologies." *See* NIKLAS LUHMANN, ORGANISATION AND DECISION (2000); NIKLAS LUHMANN, SOCIAL SYSTEMS (1995); Richard R. Nelson & Bhaven N. Sampat, *Making Sense of Institutions as a Factor Shaping Economic Performance*, 44 J. ECON. BEHAV. & ORG. 31 (2001); Richard R. Nelson, *Why Do Firms Differ, and How Does It Matter?*, 12 STRATEGIC MGMT. J. 61 (1991). For further elaboration of this model, and application in the context of ISO 14001, see Perez, Amichai-Hamburger & Shterental, *supra* note 69.

processing information change the organization's cognitive horizon, enabling the generation of new environmentally-related data which would not have been available to the organization beforehand. Overall, these new routines ensure that environmental concerns will receive a stronger presence in the firm's decision-making process, allowing for the *discursive expression* of motivations and ideas that may have been *suppressed* under the previous regime.

The viability of this structural change does not rest on economic calculations alone. One of the novel insights of the polyphonic model lies in pointing out a potential virtuous cycle that the adoption of voluntary schemes can generate between the new organizational reality and the attitudes and beliefs of the employees. It can facilitate a *positive feedback* between the organizational and individual levels, in which the transformation of the institutional structure induces psychological changes at the workers' level (e.g., in terms of the workers' attitudes toward the environment and the organization), which in turn supports the institutional changes instigated by the voluntary standard.[86] The virtuous cycle between the organizational and individual levels can unleash economic resources which were not available in the previous organizational setting, both by affecting the employees' internally-driven willingness to engage in pro-environmental behaviors and by increasing employees' commitment to the organization.[87] The endorsement of private green schemes can thus form an important part in the creation of a corporate culture that draws on social norms, rather than relying exclusively on economic incentives.[88]

The emergence of ensemble regulation fits into the foregoing narrative in two ways. First, the enforcement externalities generated by the ensemble structure make it more costly for firms to renege on their multiple commitments. But more importantly, the normative externalities associated

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86 For example, by increasing the employees' willingness to invoke the new conceptual apparatus introduced by the standard and to implement its routines.

87 For empirical analysis supporting this claim, see Perez, Amichai-Hamburger & Shterental, *supra* note 69.

88 *See* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 67, 80-83 (2008). On the importance of the institutional setting to the understanding of individual belief-formation and behavior, see Yuval Feldman & Oren Perez, *How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement*, 36 J.L. & SOC'Y 501 (2009); Slager, *supra* note 69, at 6; Chris Von Borgstede & Lennart J. Lundqvist, *Organizational Culture, Professional Role Conceptions and Local Swedish Decision-makers' Views on Climate Policy Instruments*, 8 J. ENVTL. POL'Y & PLAN. 279 (2006).

with the new regulatory ensemble enhance the social standing of the ethos of sustainable development, reinforcing both the virtuous cycle pointed out above and the emergence of a social-norms dynamic within the corporation, providing further support to the new internal regulatory order.

III. SUSTAINABILITY INDEXES: SOCIAL INFLUENCE AND POLITICS OF LEGITIMACY

The field of sustainability indexes provides an interesting case study for exploring the foregoing reflections. The market of sustainability indexes is dominated by the Dow Jones Indexes and the FTSE Group.[89] Both indexes draw on the expertise of leading environmental research agencies: the SAM Group (in the case of DJSI) and Eiris (in the case of FTSE4Good).[90]

The Dow Jones Sustainability Indexes series, which was established in 1999, tracks the financial performance of the leading sustainability-driven companies worldwide. It seeks to provide asset managers with objective benchmarks to manage sustainability portfolios. The first index in this "family" — the Dow Jones Sustainability World Index (DJSI World) — covers the top ten percent of the leading sustainability companies out of the biggest 2500 companies in the Dow Jones Global Total Stock Market

89 Some other noteworthy social-environmental indexes are *FTSE KLD 400 Social Index*, KLD INDEXES, www.kld.com/indexes/ds400index/index.html (last visited Dec. 20, 2010) (formerly known as the Domini Index); VIGEO, www.vigeo.com/csr-rating-agency/index.php?lang=en (last visited Dec. 20, 2010); AUSSI: THE AUSTRALIAN SAM SUSTAINABILITY INDEX, www.aussi.net.au (last visited Dec. 20, 2010); *Indexes*, SUSTAINALYTICS, www.jantzisocialindex.com (last visited Dec. 20, 2010) (the Canadian Jantzi Social Index); *The Calvert Social Index*, CALVERT INVESTMENTS, www.calvertgroup.com/sri-index.html (last visited Dec. 20, 2010). Other important related initiatives are ranking schemes, such as *100 Best Corporate Citizens*, CORPORATE RESPONSIBILITY MAGAZINE, http://www.thecro.com/content/100-best-corporate-citizens (last visited Dec. 20, 2010); GLOBAL 100: MOST SUSTAINABLE CORPORATION IN THE WORLD, www.global100.org (last visited Dec. 20, 2010); BUSINESS IN THE COMMUNITY, www.bitc.org.uk (last visited Dec. 20, 2010). I think that the fact that the FTSE4Good and DJSI are not just ranking exercises, but actually act as a focal source for financial decisions, makes them more influential. The institutional structure in which they are embedded is also much more developed.

90 SAM: SUSTAINABILITY INVESTING, http://www.sam-group.com/htmle/main.cfm (last visited Dec. 20, 2010); EIRIS: EXPERTS IN RESPONSIBLE INVESTMENT SOLUTIONS, http://www.eiris.org/ (last visited Dec. 20, 2010).

Index.[91] Since the launch of the DJSI World in 1999, other indexes have been added to the series.[92]

The FTSE4Good Index Series was launched in July 2001. It was designed with three objectives in mind: to provide a tool for responsible investors to identify and invest in companies that meet globally recognised corporate responsibility standards; to provide asset managers with a socially responsible investment (SRI) benchmark and a tool for socially responsible investment products; and to contribute to the development of responsible business practice around the world.[93] The firms that pass the eligibility criteria detailed in the FTSE4Good Index Series Inclusion Criteria document are automatically included in the appropriate FTSE4Good Benchmark Index.[94]

The Dow Jones and FTSE indexes both focus on positive criteria to select companies.[95] However, the indexes are based on different selection philosophies. The DJSI is based on a "best performers" approach — seeking to choose the best performers within each industrial sub-sector. FTSE4Good is based on an "absolute threshold" approach,[96] creating a crisp distinction

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91 The ranking is performed in each of the DJSI sectors. Similar methodology is employed in the other indexes in the series. *See, e.g.*, DOW JONES INDEXES, *supra* note 47, at 7, 17.

92 For the full list, see *Overview*, DOW JONES SUSTAINABILITY INDEXES, http://www.sustainability-index.com/07_htmle/indexes/overview.html (last visited Dec. 20, 2010).

93 *See* FTSE, *supra* note 47, at 1; *see also FTSE4good Index Series*, FTSE: THE INDEX COMPANY, www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp (last visited Dec. 20, 2010). The FTSE4Good Index Series encompasses four tradable and five benchmark indices, representing Global, European, US, Australia, Japan and UK markets. The FSTE group launched two additional indexes: FTSE4Good Environmental Leaders Europe 40 Index and FTSE4Good IBEX Index.

94 The firms are taken from the baseline universe index. The FTSE4Good UK and Europe tradable indices consist of the largest fifty companies in the relevant FTSE4Good Benchmark Index, by full market value. The FTSE4Good USA and Global tradable indices consist of the largest one hundred companies in the relevant FTSE4Good Benchmark Index, by full market values. For further discussion, see FTSE, GROUND RULES FOR THE MANAGEMENT OF THE FTSE4GOOD INDEX SERIES, VERSION 1.3, at 7 (2005).

95 FTSE uses some built-in exclusion criteria, while DJSI which does not rely on negative screening in its general indexes, offers some exclusion indexes. For a detailed description of the selection methodologies of both index families, see Chatterji & Levine, *supra* note 55, at 14-18; FTSE, *supra* note 47; DOW JONES INDEXES, *supra* note 47.

96 This was the phrase used by two of the FTSE interviewees. See *infra* note 97, for a description of the interviews. For DJSI approach, see SAM, THE SUSTAINABILITY YEARBOOK 2010, at 19 (2010).

between those firms that pass the eligibility criteria and those that fail. There is no similar crisp "fail" line in the DJSI discourse. These different philosophies also influence the institutional structure underlying each index, as will be elaborated below.

Two key questions arise in the study of sustainability indexes. The first concerns their functional operation as instruments of social steering; the second concerns their strategies of legitimization. The following two sections discuss these issues from a theoretical and empirical perspective, exploring the differences between FTSE4Good and DJSI. I draw in this analysis both on an extensive literature review and on several exploratory interviews I conducted with key people at the DJSI and FTSE4Good, and the Israeli Maala CSR Index.[97]

A. Sustainability Indexes as Instruments of Social Steering

There are several potential causal paths through which sustainability indexes can influence the corporate universe and society as a whole. Because this question has not been studied extensively so far, the following arguments require further empirical work. The first steering effect of sustainability indexes concerns firms' behavior. The ranking process underlying the work of these indexes provides firms with an incentive to improve their socio-environmental profile through three causal routes.

First, firms may be driven to improve their behavior due to reputational concerns (associated with the repercussions of being included in or thrown out of the index). Second, sustainability indexes may have a more subtle influence through their capacity to create a widespread evaluation matrix that can permeate the corporate order, irrespective of any instrumental calculations.[98] As noted by other scholars looking at the influence

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97 The interviews were conducted between May and August 2010 (using telephone, email exchange and in the Israeli case a face to face meeting). From DJSI: Rodrigo Amandi, Managing Director Indexes, SAM Indexes GmbH and a member of DJSI Advisory Committee) and another member who preferred to remain anonymous. From FTSE4Good: David Harris, Director of Responsible Investment, Jayn Harding, Principal Advisor, Responsible Investment, both from FTSE Group, and Patrick Mallon, International Director and Director Benchmarking and Reporting Business in the Community (member of FTSE4Good Policy Committee). I also met for a background talk with Momo Mahadav, president of Maala, the Israeli CSR index. All of the interviewees whose names are mentioned gave permission to mention their names.

98 *See* Steven Scalet & Thomas F. Kelly, *CSR Rating Agencies: What is Their Global Impact?*, 94 J. BUS. ETHICS 69, 80 & nn.12-13 (2010). Other ranking mechanisms, such the influential U.S. News & World Report rankings of law schools and

of ranking schemes, rankings can affect organizational practices and cognitive structures, leading to changes in organizational self-perceptions. By creating a continuous process of observation, measurement and evaluation, rankings can generate a reflexive process of institutional change as organizations develop anticipatory, self-disciplinary structures, which react to the evaluative metrics.[99]

The second route of influence concerns the impact of sustainability indexes on the SRI market itself: the methodologies used by the two index families to select and rank companies and their ultimate selections could constitute a normative benchmark for the SRI market as a whole.[100] Through their influence on ethical investors, sustainability indexes may have a further effect on firms, by indirectly influencing their capital costs.[101]

A third and overarching causal path concerns the influence of sustainability

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Colleges, provide an insightful analogy. *See* Michael Bastedo & Nicholas Bowman, *U.S. News & World Report College Rankings: Modeling Institutional Effects on Organizational Reputation*, 116 AM. J. EDUC. 163 (2010); Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1 (2007); Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105 (2006).

99 *See* Espeland & Sauder, *supra* note 98; Wendy Nelson Espeland & Mitchell L. Stevens, *A Sociology of Quantification*, 49 EUR. J. SOC. 401 (2008); Scalet & Kelly, *supra* note 97; Slager, *supra* note 69, at 5-7.

100 Another related area of research focuses on the considerations leading individuals to invest in ethical funds. *See* Eva Hofmann, Erik Hoelzl & Erich Kirchler, *A Comparison of Models Describing the Impact of Moral Decision Making on Investment Decisions*, 82 J. BUS. ETHICS 171 (2008); Eva Hofmann, Katja Meier-Pesti & Erich Kirchler, *The Decision Process for Ethical Investment*, 12 J. FIN. SERV. MARKETING 4 (2007).

101 Whether the SRI market has an influence on the cost of capital of "sustainable" companies is a debatable issue. *See* Darren D. Lee, Robert W. Faff & Kim Langfield-Smith, *Revisiting the Vexing Question: Does Superior Corporate Social Performance Lead to Improved Financial Performance?*, 34 AUSTL. J. MGMT. 21 (2009). Another question, which has been discussed in the literature, concerns the financial performance of ethical financial instruments and sustainable indexes relative to conventional financial instruments. The evidence in this respect is still mixed and I will not discuss it here. *See, e.g.*, Rob Bauer, Jeroen Derwall & Roger Otten, *The Ethical Mutual Fund Performance Debate: New Evidence from Canada*, 70 J. BUS. ETHICS 111 (2007); Geoffrey M. Heal, *Corporate Social Responsibility: An Economic and Financial Framework*, 30 GENEVA PAPERS 387 (2005); Darren D. Lee & Robert W. Faff, *Corporate Sustainability Performance and Idiosyncratic Risk: A Global Perspective*, 44 FIN. REV. 213 (2009); Wim Vermeir, Eveline Van de Velde & Filip Corten, *Sustainable and Responsible Performance*, 14 J. INVESTING 94 (2005).

indexes on the thematic horizon of the entire CSR market.[102] A good example of this phenomenon is the inclusion of new climate change criteria in the FTSE4Good criteria in 2007.

The empirical work which has been done so far in this area provides only partial answers to these tentative hypotheses. A recent study exploring the FTSE4Good index examined its effect on corporate behavior through a questionnaire-based survey of companies listed on the FTSE4Good UK and Europe indices, conducted in May 2004. The results suggest that the FTSE4Good initiative had some impact on the internal dynamics of listed companies, especially with respect to reporting and management procedures.[103] A study of the KLD Indexes by Chatterji and Toffel provides additional support for the findings of this study.[104] Chatterji and Toffel draw on the reputational effect of the index (similarly to Potoski and Prakash's "green club" model[105]), arguing that poor ratings shame firms and threaten their legitimacy. Poorly rated firms, they argue, will be particularly likely to respond in ways that improve their ranking, causing managers to implement practices aimed at improving their firms' standing with the independent rating agencies. They further propose that the subset of poorly rated firms that face lower-cost improvement opportunities will be especially likely to make the investments needed to improve their ratings. They find that firms that initially received poor KLD ratings subsequently improved their environmental performance more than other firms, and that this difference was driven by firms in highly regulated industries and by firms with more low-cost opportunities to exploit.

Both FTSE4Good and DJSI have an engagement program with firms (based on continuous dialogue), with seemingly positive outcomes. The interviewees from the FTSE Responsible Investment team[106] noted that FTSE had (on average) a sixty percent success rate in helping companies move towards meeting the various inclusion criteria for FTSE4Good, with over four hundred companies moving to meet new criteria.[107] A recent report by SAM gives a similar assessment of the DJSI engagement program. The

102 This issue was raised by the president of Maala.

103 George Cobb, David Collison, David Power & Lorna Stevenson, *FTSE4Good: Perceptions and Performance*, 88 CERTIFIED ACCOUNTANTS EDUCATIONAL TRUST RESEARCH REPORT 5 (2005).

104 Chatterji & Toffel, *supra* note 69.

105 POTOSKI & PRAKASH, THE VOLUNTARY ENVIRONMENTALISTS, *supra* note 29.

106 Interview with FTSE Director of Responsible Investment and FTSE Principal Advisor, Responsible Investment.

107 This positive assessment of the engagement program was confirmed by another member of the FTSE4Good Policy Committee (Patrick Mallon).

engagement process draws on a company-specific benchmarking report which is sent to firms annually by SAM, and allows firms to understand where they are lagging behind their peers and often triggers a dialogue between SAM and the firms. During 2001-2009 seventy percent of participating firms have improved their total scores (on average).[108]

Further support for the integrity of the FTSE4Good engagement program can be found by examining the way in which FTSE Inclusion Criteria have been applied. To study this question I have analyzed all the additions and deletions from the FTSE Index universe from September 2003 to March 2010, distinguishing between the different subject areas.[109] The results are summarized in the table below. The findings demonstrate that the criteria were frequently used to throw out laggards — they had, in other words, a significant "bite." They also reflect a dominance of environmental considerations, which constitute sixty-seven percent of the total deletions.[110] While this analysis does not settle the question whether the engagement process has an impact on firms' behavior, it does signal that the threat of being "thrown out" is real.

Table 2: additions and deletions, FTSE Index: September 2003 — March 2010

	Sep 03	Mar 04	Sep 04	Mar 05	Sep 05	Mar 06	Sep 06	Mar 07	Sep 07	Mar 08	Sep 08	Mar 09	Sep 09	Mar 10
Additions	72	75	79	61	42	40	24	25	42	41	36	23	33	23
Deletions	43	29	23	27	24	19	9	17	24	15	12	16	15	5
Deletions by subject														
Climate Change	–	–	–	–	–	–	–	–	–	7	1	4	1	–
Countering Bribery	–	–	–	–	–	–	–	2	7	4	6	9	3	–
Environment	18	19	17	23	22	18	7	12	12	4	2	2	4	2

108 SAM, *supra* note 96, at 19, 21. This evaluation of the DJSI engagement program was confirmed by the Managing Director Indexes, SAM Indexes.

109 *Review Summaries*, FTSE4GOOD, www.ftse.com/Indices/FTSE4Good_Index_Series/Index_Reviews.jsp (last visited Dec. 20, 2010). The analysis in this Article uses the subject-headings of FTSE.

110 162 out of a total of 242.

Human & Labor Rights	7	11	2	2	–	1	–	–	6	2	5	5	7	3
Nuclear & Weapons Exclusion	–	–	–	–	1	–	1	1	–	–	–	–	1	–
Supply Chain Labour Standards	–	–	–	–	1	–	1	2	2	1	1	–	–	–
Market & Stakeholder Changes	21	1	4	1	–	–	–	–	–	–	–	–	–	–

What kind of influence do sustainability indexes have on the structure of the SRI market? Fowler and Hope examined this question by looking at total investment funds managed using sustainable indices.[111] Drawing on this data, they find that the impact of sustainable indices to date has been limited.[112] While the methodology used by Fowler and Hope is certainly relevant, it does not necessarily capture the impact of the indexes, which can be reflected also in their indirect influence on the methodologies and choices of investment agents. Chatterji et al. also assume that ratings have a substantial influence over the SRI market; however, they only offer anecdotal evidence for this claim and their study actually focuses on another question — to what extent sustainability ratings (in their context — the KLD index) help stakeholders to identify companies which are truly "environmentally responsible."[113] The

111 Stephen J. Fowler & C. Hope, *A Critical Review of Sustainable Business Indices and Their Impact*, 76 J. BUS. ETHICS 243 (2007).

112 They found that as of December 2003 2.45 billion Euros was managed by funds tracking the DJSI index, with less of that amount using the FTSE4Good. This is a relatively small figure compared with the total SRI funds in the United States. However, since the paper was published the number of index-based financial products has increased significantly and as of the end of February 2010 the assets managed in these products totaled more than eight billion dollars. *See Licensing*, DOW JONES SUSTAINABILITY INDEXES, www.sustainability-index.com/07_htmle/other/licensing.html (last visited Feb. 28, 2010).

113 Aaron K. Chatterji, David I. Levine & Michael W. Toffel, *How Well do Social Ratings Actually Measure Corporate Social Responsibility?*, 18 J. ECON. & MGMT. STRATEGY 125 (2009). Scalet and Kelly present an empirical study of CSR rating agencies (Innovest and CRO Magazine). They find — contra to Chatterji and Toffel

interview with FTSE Responsible Investment provided further support for this claim. The FTSE team noted that "there are currently around eighty clients and eight billion Euros AUM linked to FTSE4Good Index Series." In addition, they note, many asset managers use the "FTSE4Good inclusion criteria and review results as a benchmark to engage with companies in their own portfolio."[114] The recent SAM report notes that there is currently eight billion dollars worth of assets invested based on the DJSI, and that other investors draw on the indexes in designing their ethical investment strategy.[115]

The foregoing evidence provides tentative support for the argument that sustainability indexes have some steering capacity. It is clear, however, that more work needs to be done in order to unfold their exact sociological impact. Thus, for example, while the data provided by FTSE and DJSI regarding their respective engagement programs seems to indicate a substantial steering potential, it also leaves many open questions pertaining, for example, to the causal linkage between the ranking (or engagement) process and the firms' projected progress in FTSE/DJSI scores.

B. In Search of Legitimacy: Different Legitimization Philosophies Across the Atlantic

Both the DJSI and FTSE4Good are engaged in legitimization efforts, seeking to establish their epistemological authority and political legitimacy. They are concerned both with demonstrating their expertise in devising (and implementing) CSR criteria and with justifying their normative authority.[116] These dual strategies are reflective of the legitimization discourse that characterize other transnational institutions, which engage in the production of global environmental norms.[117] In this context there are striking differences

— that being dropped from a CSR ranking appears to do little to encourage firms to acknowledge and address problems related to their social and environmental performance. However, the authors themselves note that their methodology cannot capture all the possible impacts of ranking institutions and consider their study primarily as an exploratory exercise. *See* Scalet & Kelly, *supra* note 98.

114 FTSE Director of Responsible Investment and FTSE Principal Advisor, Responsible Investment.

115 *See* SAM, *supra* note 96, at 22.

116 I will not be able within the scope of this Article to engage in a critical evaluation of the selection criteria developed by DJSI and FTSE4Good. On this point, see Chatterji & Levine, *supra* note 55, at 14-18.

117 *See* Bernstein & Cashore, *supra* note 12 (on the importance of democratization norms for achieving legitimacy); Dieter Kerwer, *Rules That Many Use: Standards and Global Regulation*, 18 GOVERNANCE 611 (2005) (on the role of expertise).

between the two schemes. FTSE4Good has developed a twofold strategy drawing both on a long tradition of financial expertise, which was augmented by the environmental and social expertise of Eiris, and on an elaborated system of public consultation and public representation in its decision-making processes. By contrast, the DJSI draws exclusively on the epistemic authority of SAM, which is one of the leading global investment groups focusing on the field of sustainability investment and on its own expertise in developing stock indexes.[118]

Let me elaborate on the way in which these distinct strategies have been implemented at the institutional level. FTSE has developed an elaborated consultation process led by the FTSE4Good Policy Committee together with FTSE's Responsible Investment Unit (which acts as a secretariat). The Policy Committee manages the evolution of the FTSE4Good Index Series. It is an independent body consisting of experts from the fields of corporate responsibility, fund management, academia and the business community.[119] The FTSE4Good Policy Committee's role is to[120]:

- Act as an independent judge of the ability of constituent companies to meet the FTSE4Good Index Series criteria;
- Oversee the consultation process undertaken to develop criteria;
- Approve criteria revisions or new criteria.

All the interviewees from FTSE have emphasized the autonomy of the Committee, noting that it "provides independent feedback and decisions" and highlighting its independence from both FTSE's Responsible Investment Unit and Eiris.[121] The engagement program has not compromised, they noted, the rigor and integrity of TSE4Good inclusion criteria. During the operation of the index, they noted, "The

118 Unlike Eiris, which is a not-for-profit organization that offers independent assessments of companies and advice on integrating them with investment decisions, SAM is a for-profit investment group (although driven by a strong sustainability ethos).

119 For a list of the Committee members, see *Index Rules*, FTSE: THE INDEXING COMPANY, www.ftse.com/Indices/FTSE4Good_Index_Series/Index_Rules.jsp (last visited Dec. 20, 2010).

120 The Committee's authority is set in the ground rules for the management of the FTSE, *supra* note 94.

121 Interview with the Director of Responsible Investment and Principal Advisor, Responsible Investment. I received further confirmation of this view in the interview I conducted with Patrick Mallon, an independent member of the Committee.

FTSE4Good Policy Committee has approved the deletion of some very large and significant companies . . . as well as smaller ones."[122] One of the interviewees also noted in this context that the executive team uses the Committee's authority to justify decisions before companies as part of the engagement process.[123]

FTSE has also committed itself to a rigoros and inclusive process of criteria development. The process consists of five stages which are overseen by the FTSE4Good Criteria Development Subcommittee:

1. Issues identified with experts;
2. Focus groups to find or test potential criteria that could be used and to find areas of consensus that different stakeholders (e.g., investors, NGOs and companies) can all support;
3. Market consultation on proposed criteria options;
4. The results from the consultation and recommendations are given to the FTSE4Good Policy Committee, which makes the final decisions and approves the final criteria;
5. Criteria implementation is then carried out in a staged manner.[124]

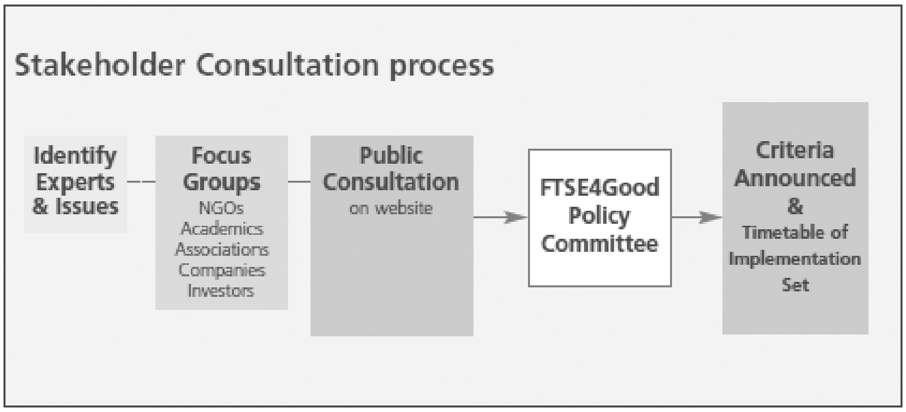
The consultation process is illustrated in the following diagram[125]:

122 Interview with the Director of Responsible Investment and Principal Advisor, Responsible Investment. This positive assessment of FTSE engagement program is also shared by external observers. *See, e.g.*, Slager, *supra* note 69, at 14-16.

123 Interview with Patrick Mallon, an independent Committee member.

124 FTSE4GOOD INDEX SERIES, IMPACT OF NEW CRITERIA & FUTURE DIRECTION: 2004-2005 REPORT 8 (2004-2005), *available at* http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_New_Criteria_&_Future_Impact_report.pdf.

125 FTSE4GOOD INDEX SERIES, CRITERIA DEVELOPMENT AND COMPANY ENGAGEMENT PROGRAMME: 2003-2004 REPORT 3 (2004), *available at* http://www.ftse.com/Indices/FTSE4Good_Index_Series/Downloads/FTSE4Good_ Company_Engagement_Report.pdf.



As noted above, the Policy Committee also has the ultimate authority to approve changes to the constituents of the FTSE4Good universe (that is, any deletions or additions to the indexes).[126] The underlying philosophy of the FTSE4Good — a commitment to an absolute threshold approach — has led to the development of a semi-legalistic structure, which includes an appeal procedure, dealing with cases in which companies disagree with the decisions of the Committee.[127]

In contrast to the relatively open and inclusive decision-making process of the FTSE4Good scheme DJSI, has taken a more opaque and less open approach, reflecting a different legitimization strategy which draws on its epistemic credentials. Indeed, when I asked the Managing Director Indexes (SAM) about the importance of the Advisory Board for the legitimacy of the DJSI index series, he noted that DJSI relies primarily on its in-house expertise and internal knowledge. Until the end of 2009, the decision-making process in the context of the Dow Jones sustainability indexes was governed by two committees.[128] The DJSI World Index Design Committee is solely responsible for all changes to the index methodology and for auditing the index composition at the annual and quarterly reviews.

126 *Id*.

127 FTSE, *supra* note 94, at 13. The appeals are heard a Controversies Subcommittee which has been combined with the Criteria Development subcommittee. In reality the process tends to be less legalistic, taking the shape of "informed discussion." Interview with FTSE Director of Responsible Investment and FTSE Principal Advisor, Responsible Investment

128 DOW JONES INDEXES, *supra* note 47.

It is an internal committee, closed to external stakeholders, consisting of two representatives from each — Dow Jones & Company and the SAM Group (the consulting agency responsible for collecting and analyzing the data on which the index is based). The second committee, the DJSI Advisory Committee, which was replaced at the end of 2010 by a different body called SAM Faculty, was open to external stakeholders. The DJSI Advisory Committee was composed of independent, third-party professionals from the financial sector and the field of corporate sustainability performance. Its powers and functions were limited, however, to "provide insights into the field of sustainability and investing, give advice on possible implications for sustainability-driven portfolio management and offer input regarding the methodology, marketing as well as product development for the Dow Jones Sustainability Indexes."[129]

The DJSI website did not provide any details on the work of the Advisory Committee or its membership. Details about the members of the Committee were posted on SAM's website (which gave no further data about the Committee).[130] It was only through the interviews that I found out that the Advisory Committee was being replaced by the new "SAM Faculty." The Faculty consists of five to ten members (one of whom is a Dow Jones employee or designee) who can provide a broad range of perspectives in terms of sustainability subjects. The establishment of the new body was driven by an attempt to create a broad pool of knowledge with people representing different voices.[131] The vision behind this new body seems then to be primarily epistemological — not political. SAM Faculty was incorporated into the new version of the DJSI Guide Book, which was published in November 2010.[132] It is reflective of the apolitical nature of this new body that the decision to establish it was made public only several months after it was taken, without any consultation with the public (leaving the irrelevant data about the Advisory Committee on the SAM and DJSI websites).[133]

FTSE4Good and DJSI seem to represent therefore different approaches to legitimacy building. While FTSE has adopted a twofold strategy, which

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129 *Id*.

130 www.sam-group.com/htmle/djsi/advisory_board.cfm (last visited Aug. 1, 2010). With the establishment of the new "SAM Faculty" this data was removed.

131 Interview with Managing Director Indexes, SAM Indexes; email exchange with a member of DJSI Advisory Committee.

132 DOW JONES INDEXES, *Supra* note 47, at 40.

133 As of August 1, 2010, neither the SAM nor the DJSI website has included data about the new body; both continued to refer to the (then) irrelevant Advisory Committee.

draws both on its epistemic authority and on an elaborated system of public consultation and civic representation, DJSI seems to rely primarily on its epistemic authority and business reputation. FTSE's dual strategy is a reflection a "growing normative consensus on the need to 'democratize' global governance."[134] Indeed, global environmental organizations, such as the GRI, AccountAbility and the newly established Equator Principles Financial Institutions Association, have developed progressive consultation and deliberative schemes as well as far-reaching transparency mechanisms.[135] These processes, combined with mutual observation between distinct regimes, have created network pressures pushing for democratization. This push towards democratization is not just driven by expanding social expectations and network pressures; it is also codified in an emerging global administrative law.[136] In that respect, DJSI's exclusive reliance on expertise as a source of legitimacy is a kind of anomaly that goes against this overall trend. One possible answer to this anomaly is that the strong position of the Dow Jones Indexes group in the United States market, together with the epistemic reputation of Dow Jones and SAM, allows it to sidestep these pressures. Whether DJSI can sustain this legitimization structure against the calls for greater democratization of transnational governance remains to be seen.

CONCLUSIONS

The new universe of private environmental governance constitutes an intensely interconnected network of governance. It is a mistake to observe this network — especially the subset of CSR instruments — through the dual prisms of "greenwash" and "soft law." First, because this conceptual apparatus disregards the positive enforcement and normative externalities generated by the ensemble structure of this private regulatory network, and second, because these two notions underestimate the virtuous, reciprocal

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134 Bernstien & Cashore, *supra* note 12, at 353.

135 *See Network Overview*, GLOBAL REPORTING INISIATIVE, http://www.globalreporting.org/AboutGRI/WhoWeAre/NetworkOverview/; ACCOUNTABILITY, *supra* note 73; THE EQUATOR PRINCIPLES ASSOCIATION, GOVERNANCE RULES, para. 6 (2010), *available at* http://www.equator-principles.com/documents/EPGovernance_Rules_April_2010.pdf. Further examples are discussed in Bernstein & Cashore, *supra* note 12, at 353.

136 Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 37 (2005).

dynamic that the adoption of voluntary environmental codes may instill in firms adopting them.

The expansion of private regulation over the last decade represents a robust social process, which is likely to further expand in the next decade. The ISO CSR standard, ISO 26000,[137] represents a recent new entrant into this network. In parallel, existing schemes, such as ISO 14001 and GRI, are constantly expanding. As the boundaries and depth of this regulatory ensemble expand, the question of its legitimacy becomes more important — normatively and sociologically. The case of sustainability indexes demonstrates the interplay between two legitimization strategies — epistemic and political. The pressure towards further democratization of decision-making processes within transnational bodies creates a tension between epistemic and political notions of legitimacy. Finding institutional solutions to this tension is a significant challenge for transnational institutions. In the case of FTSE4Good and DJSI, it will require continued experimentation with modes of participation that can coexist with these institutions' claim to epistemic authority.

While this Article has argued that it is a mistake to dismiss these private CSR instruments as cheap talk, one has to be realistic about their capacity to trigger radical changes. These instruments, and the political realm they have created, remain constrained by the precepts of modern capitalism. The participatory opportunities that have been created by FTSE (and to a lesser extent by DJSI) are limited by the broad institutional framework in which they are situated. There is no room within this political setting for challenging, for example, the basic characterization of sustainability indexes as financial instruments that are intertwined with the current global financial system. Any radical changes to the way in which corporations manage their environmental profile will require global, coordinated political action. The new political opportunities which have been created by this new regulatory ensemble do not provide a suitable vehicle for such radical change, because their innate structure delimits the horizon of political action. Indeed, as environmental groups adapt to the new political structure and react to the opportunities for action it provides, they forgo more radical options of resistance and critique, which might question the basic presuppositions upon which the current global capitalist order is based.[138]

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137 INTERNATIONAL STANDARDS ORGANIZATION (ISO), ISO 26000 (2010).

138 Radical critique is different, in that sense, from social protest. *See* NIKLAS LUHMANN, RISK: A SOCIOLOGICAL THEORY 126 (1993) ("The form of protest remains a form that presupposes the other side that is to react to the protest").